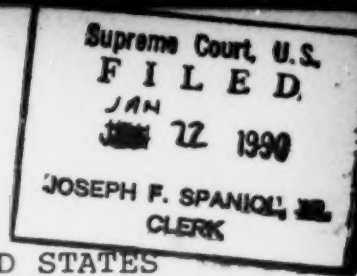


89-1931<sup>①</sup>

No.



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

---

ESTHER MOUNT AND HUSBAND JIM MOUNT

v.

MELVIN F. GORELICK, M.D., AND ROGER  
BARTELS, M.D., EACH INDIVIDUALLY

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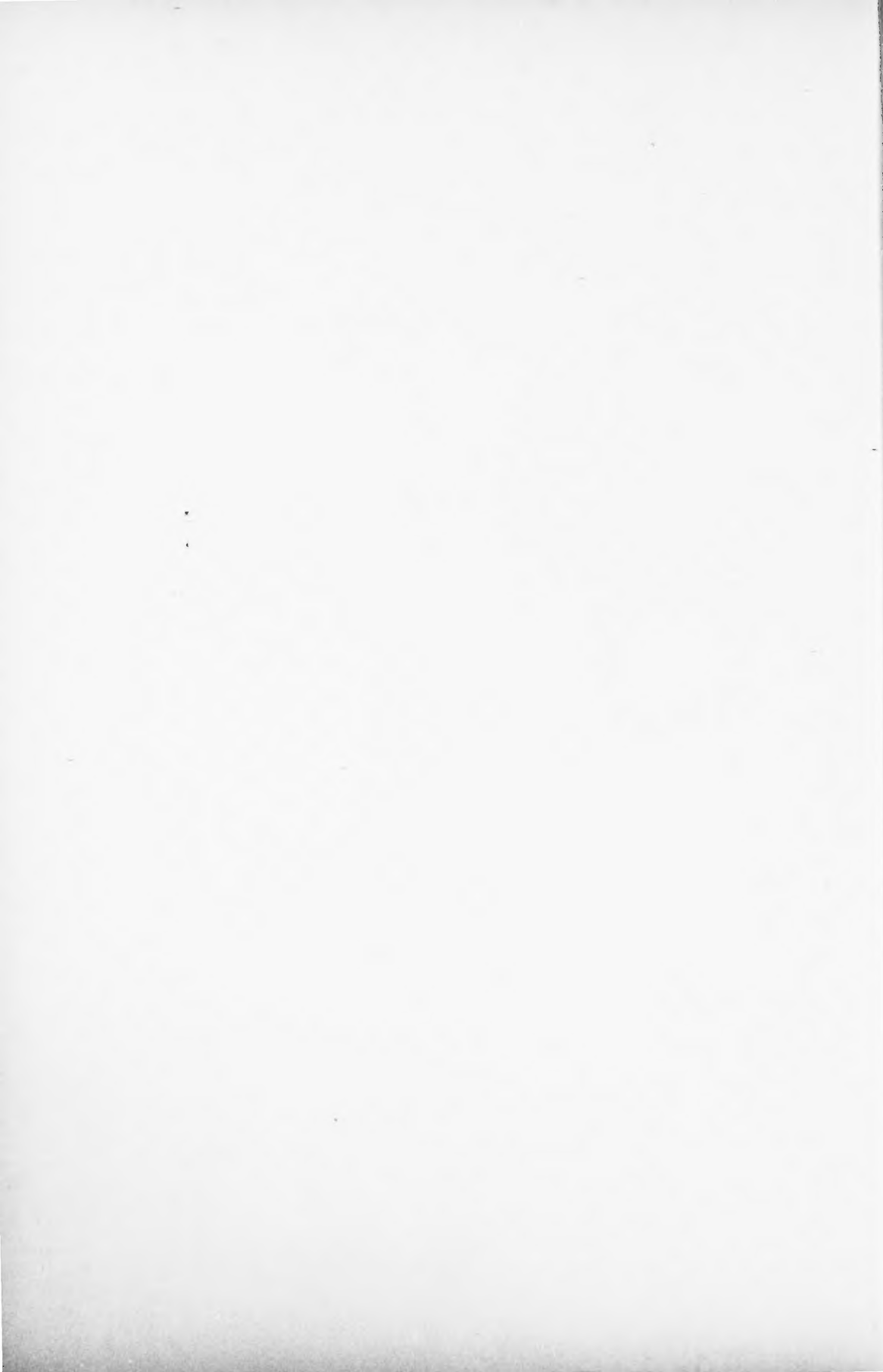
PETITION FOR A WRIT OF CERTIORARI TO THE STATE  
OF CALIFORNIA SUPREME COURT

---

JIM MOUNT

Attorney for self and ESTHER MOUNT,  
deceased.

13211 Cielo Azul  
Castroville, California 95012  
(408) 373-3337  
(408) 633-3913



## QUESTIONS PRESENTED

1. Whether petitioners' failure to produce expert testimony in rebuttal of respondents' motions for summary judgment is sufficient to deny petitioners' right to a jury trial, when expert testimony is not required to prove the gist of petitioner's pleading, to-wit: the lack of informed consent.

2. Whether petitioners' failure to produce expert testimony in rebuttal of respondents' motions for summary judgment is sufficient to deny petitioners' right to a jury trial, when petitioners produced interrogatories and answers from respondents, as well as depositions that supported petitioners' pleading and raised issues requiring



submission to a jury.

3. Whether respondents' motions for summary judgment unrebutted by petitioners' expert testimony can overrule case law, to-wit: expert testimony is not required to prove lack of informed consent.



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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

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ESTHER MOUNT AND HUSBAND JIM MOUNT

v.

MELVIN F. GORELICK, M. D., AND ROGER  
BARTELS, M.D., EACH INDIVIDUALLY

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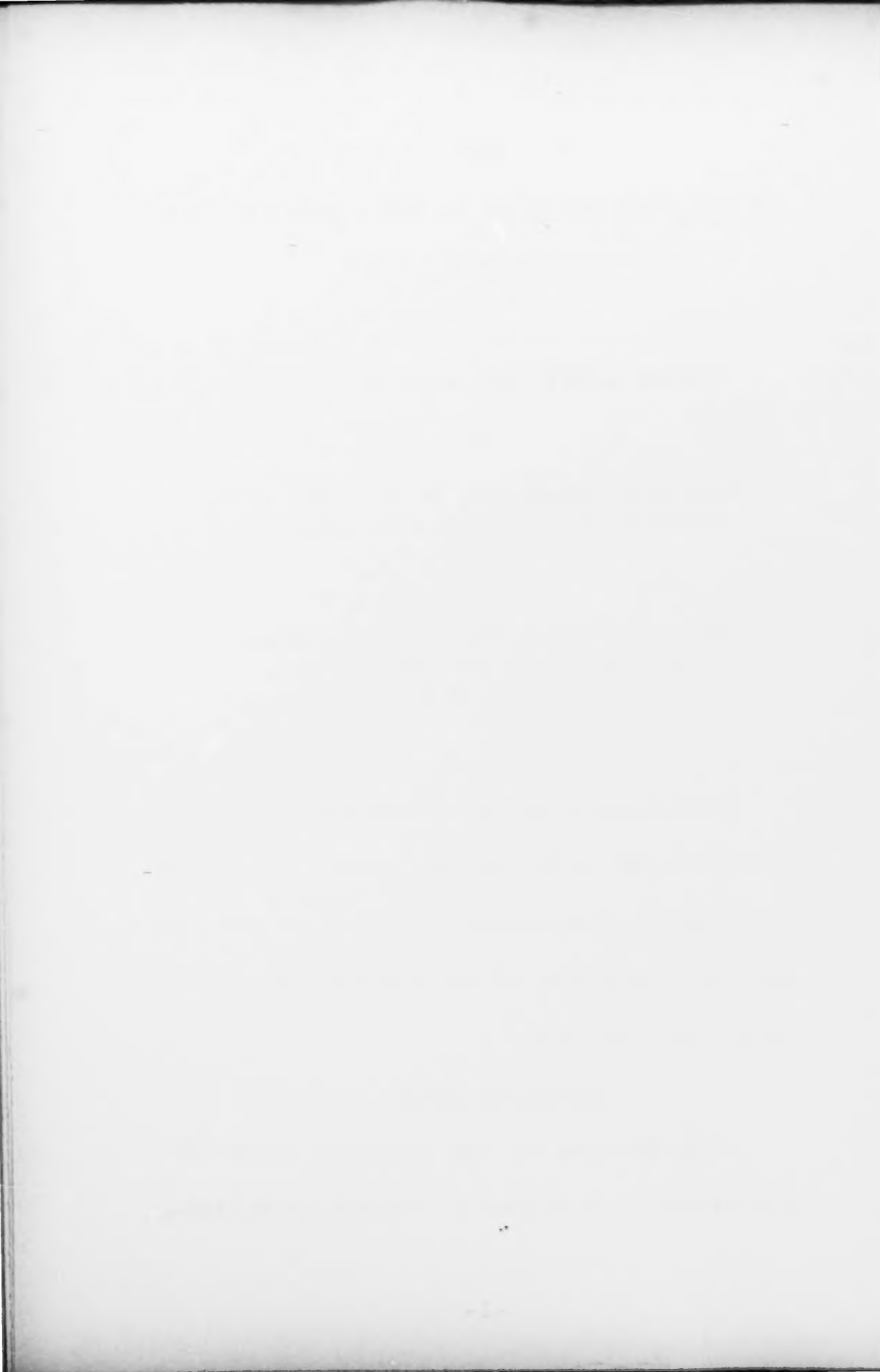
PETITION FOR A WRIT OF CERTIORARI  
TO THE STATE OF CALIFORNIA  
SUPREME COURT

---

Jim Mount, on behalf of himself and  
his deceased wife, Esther Mount, petitions  
for a writ of certiorari to review the judgment of the State of California Supreme Court in this case.

OPINIONS BELOW

The opinion of the superior court of  
the State of California, County of Monterey,



(App. A, infra ) is not reported. The opinion of the court of appeal of the State of California, sixth district, (App. A, infra ) is not reported.

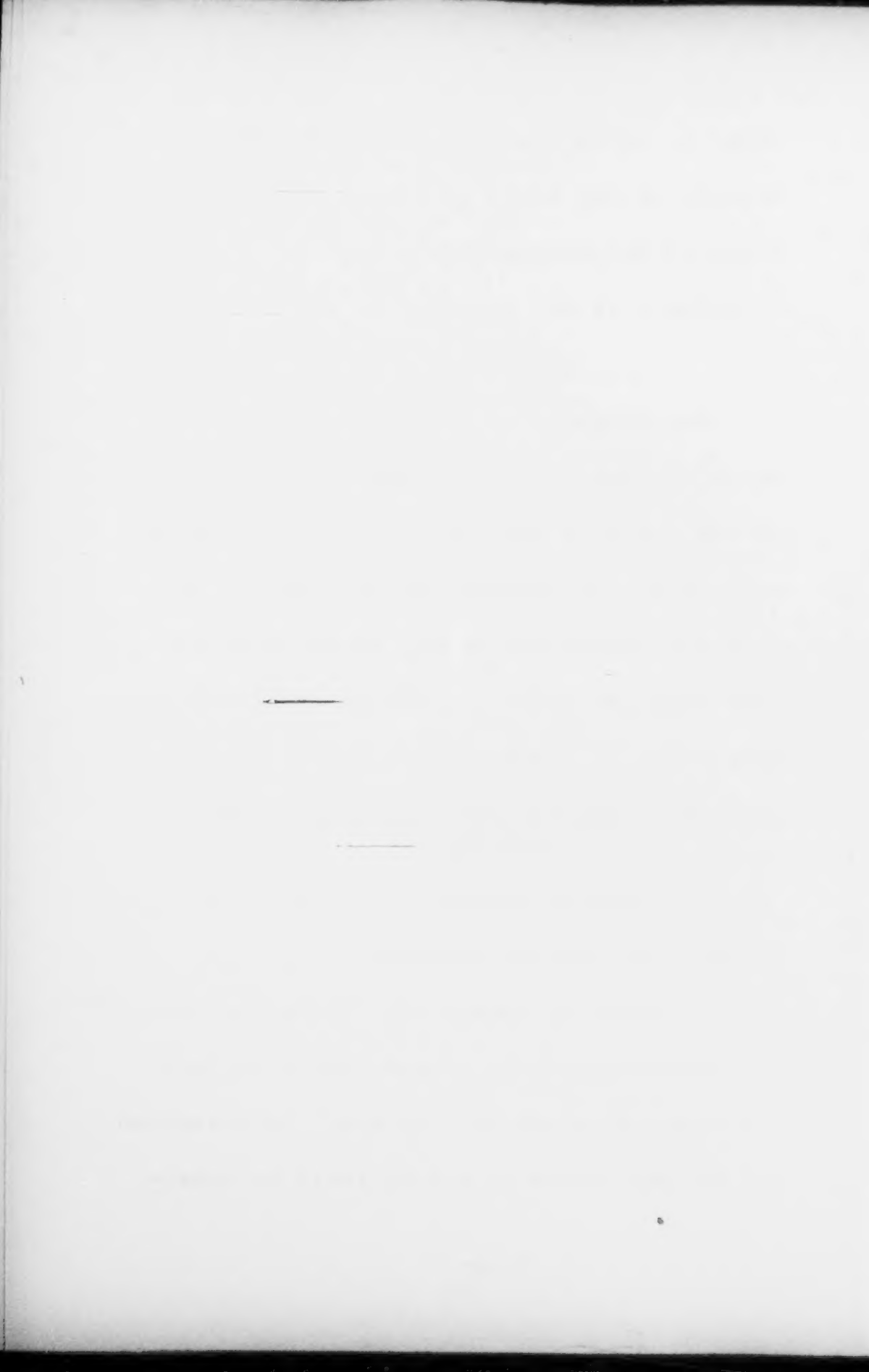
### JURISDICTION

The judgment of the State of California Supreme Court affirmed the judgment of the State of California court of appeals, sixth district, without an opinion. A petition for review was denied on November 29, 1989 (App. A, infra ). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution provides:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be other-



wise re-examined in any Court of the United States, than according to the rules of the common law.

### STATEMENT

Petitioners complain that respondents did not properly advise the decedent, Esther Mount, of alternative treatments and risks, and or the risks of the treatment she received at the hands of each respondent. The respondents, therefore, did not have the informed consent of decedent, Esther Mount, to perform their treatment.

Petitioners pleadings are sufficient to raise the issue of lack of informed consent by decedent, Esther Mount, to each of the respondents. Respondents in their answers to interrogatories, depositions, medical records, and declarations substantiated petitioners' pleadings, certainly to the degree of submission to a jury.





Petitioners did not file additional affidavits to respondents' motions for summary judgment as it is unnecessary to prove lack of informed consent by expert testimony in California.

The Superior Court granted respondents' motions for summary judgment. The Court of Appeal of the State of California, sixth district, affirmed the Superior Court judgment and denied a petition for review.

Petitioners have exhausted their State Court remedies.

#### REASONS FOR GRANTING THE PETITION

This case presents important questions concerning the distance to which a motion for summary judgment can be extended. In effect the holding of the State of California Courts permits the motions for summary judgment to change case law and go far beyond the legislative intent when enacting said motions,



to-wit: it is not necessary to produce expert testimony to prove lack of informed consent unless a motion for summary judgment is filed, then you must produce expert testimony. This must be done although you have already produced sufficient evidence to have a jury decide jury issues.

This is contra to a number of cases, but to cite only a few in hope that this Court will not easily trade a certainty for a doubt.

Robertson v. White, 635 F. Supp. 851 (1986) held that summary judgment should be "cautiously invoked" so that no person will be improperly deprived of his seventh amendment right to a jury trial.

Diederich et al v. American News Co. 128 F. 2d 144 (10th Cir. 1942) held the right to a jury trial guaranteed by the Federal Constitution cannot be impaired or taken away by state constitutional or statutory provisions.

Chicago, Rock Island and Pacific Railway Co. v. Howell, 401 F. 2d 752 (10th. Cir. 1968) held in diversity suit competency of circumstantial evidence to prove plain-

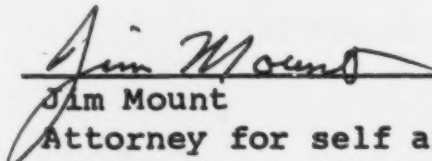


tiff's case was controlled by Federal Common law. Weight and credibility of evidence was for jury to decide and not the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

  
\_\_\_\_\_  
Jim Mount  
Attorney for self and  
Esther Mount, Deceased

January, 1990

Dated



APPENDIX A

Law Offices

Hoge, Fenton, Jones & Appel, Inc.

Post Office Box 791

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Monterey, Ca. 93940

408-373-1241

SUPERIOR COURT OF CALIFORNIA, COUNTY OF MONTEREY

ESTHER MOUNT and Husband JIM )	Case No. M 18548
MOUNT,	)
	) ORDER GRANTING
Plaintiffs,	) MOTION FOR SUMMARY
	) JUDGMENT
v.	)
	)
MELVIN F. GORELICK and Roger )	
	)
BARTELS, each individually,	)
	)
Defendants.	)
<hr/>	

The motion of defendant ROGER BARTELS for an order granting summary judgment came regularly for hearing by the court on May 6, 1988. Plaintiff JIM MOUNT appeared in pro per. Defendant ROGER BARTELS appeared by counsel Donald A. Miller.

On consideration of all evidence set forth and the papers submitted, and the

Dear Mr. [Name] -

I have your letter of the 10th inst. regarding the [subject] and am sorry that I cannot give you a more definite answer at this time. The [subject] is being handled by the [department] and I am sure that you will be satisfied with the results.

I am sure that you will be satisfied with the results. The [subject] is being handled by the [department] and I am sure that you will be satisfied with the results.

I am sure that you will be satisfied with the results. The [subject] is being handled by the [department] and I am sure that you will be satisfied with the results.

I am sure that you will be satisfied with the results. The [subject] is being handled by the [department] and I am sure that you will be satisfied with the results.

I am sure that you will be satisfied with the results. The [subject] is being handled by the [department] and I am sure that you will be satisfied with the results.

I am sure that you will be satisfied with the results. The [subject] is being handled by the [department] and I am sure that you will be satisfied with the results.



inferences reasonably deducible therefrom, except that to which objection has been sustained, the court determines that there is no triable issue as to any material fact and that defendant ROGER BARTELS is entitled to judgment as a matter of law. Accordingly,

IT IS ORDERED that the motion of defendant be, and hereby is, granted, and that judgment be entered accordingly for defendant ROGER BARTELS and against plaintiffs ESTHER and JIM MOUNT.

Dated: MAY 16 1988

signed: RICHARD M. SILVER  
JUDGE OF THE SUPERIOR  
COURT



EDWARD A. HINSHAW  
BARRY C. MARSH  
Law Offices of  
EDWARD A HINSHAW  
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(408) 293-5959

BCM/as

Attorneys for Defendant MELVIN F. GORELICK, M.D.  
SUPERIOR COURT OF CALIFORNIA, COUNTY OF MONTEREY

ESTHER MOUNT and  
Husband, JIM MOUNT,

Plaintiffs, No. M 18548

vs.

ORDER AND JUDGMENT

MELVIN F. GORELICK and  
ROGER BARTELS, each  
individually.

Defendants.

---

The motion for summary judgment of  
MELVIN F. GORELICK, M.D. came on regularly for  
hearing before the Honorable Richard M. Silver  
Judge of the Superior Court, on May 6, 1988.



Barry C. Marsh appeared on behalf of MELVIN F. GORELICK, M.D., Donald Miller appeared on behalf of ROGER BARTELS, M.D. and Jim Mount appeared on behalf of plaintiffs.

The motion for summary judgment was granted as requested by both defendants MELVIN F. GORELICK, M.D. and ROGER BARTELS, M.D. The order was based upon the absence of any triable issue of material fact and therefore, defendants were entitled to judgment as a matter of law. Further, the court adopted the statement of undisputed facts submitted by each defendant.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment shall be entered in favor of MELVIN F. GORELICK, M.D. and against plaintiffs, ESTHER MOUNT AND JIM MOUNT.

IT IS FURTHER ORDERED MELVIN F. GORELICK, M.D. shall be entitled to costs of suit incurred herein as against plaintiffs



ESTHER MOUNT and JIM MOUNT.

Dated: MAY 27 1988

signed: RICHARD M. SILVER  
JUDGE OF THE SUPERIOR  
COURT





NOT TO BE PUBLISHED IN OFFICIAL REPORTS

Filed Sep 14 1989  
Court of Appeal  
Sixth App. Dist.  
Michael J. Yerly,  
Clerk

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

ESTHER MOUNT, et al.,

Plaintiffs and  
Appellants,

H004604

Monterey County  
Sup. Ct. No.M 18548

v.

MELVIN F. GORELICK, et al.,

Defendants and  
Respondents.

---

STATEMENT OF THE CASE

Plaintiff Jim Mount individually and as representative for Esther Mount ("the decedent") appeals from judgments entered after the court granted summary judgment to defendant Dr. Melvin F. Gorelick, M.D., and Dr. Roger Bartels, M.D.<sup>1</sup> On appeal, Mount claims that the trial court erred in concluding there are no triable



issues of fact with respect to the complaint.

We affirm the judgments.

---

1. Both Jim and Esther Mount filed the complaint in this action. Regretably, however, Esther Mount has since died.

#### SCOPE OF REVIEW

In reviewing an order granting summary judgment, we first identify the issues framed by the pleadings. (AARTS Productions, Inc. v. Crocker National Bank (1986) 179 Cal. App. 3d 1061, 1064.) Then, we determine whether the moving party's showing has established facts which negate the opponent's claim and justify a judgment in the movant's favor. (ibid.) If the motion prima facie justifies a judgment, we then determine whether the opposition demonstrates the existence of a triable, material issue of fact. (Id. at p. 1065.)



## THE PLEADED ISSUES

Mount's complaint asserts causes of action against Gorelick and Bartel for medical malpractice. He alleges that Gorelick and Bartels negligently performed their surgical procedures and did not properly advise the decedent of alternative treatments and risks and, therefore, her consent to their proposed treatment was not "informed consent."

## UNDISPUTED FACTS

On April 9, 1986, Gorelick examined the decedent and found a pigmented lesion on the sole of her right foot, which had been there for 15 years. He pared down the pigment but did not observe any suspicious dots, and scheduled a punch biopsy for the next morning to rule out malignant melanoma. On April 10, Gorelick again examined the lesion, pared it down a bit more and observed, inter alia, that it was almost evenly black and brown throughout. He performed the biopsy and sent to obtain the appropriate tissue sample and forwarded it to Community



Hospital of the Monterey Peninsula for review by the pathology department. The pathology department report indicated a "malignant melanoma in situ (Level 1 Malignant Melanoma)." Upon receiving the report, Gorelick referred the decedent to Bartels, a plastic surgeon, for followup surgery.

On April 14, 1986, Bartels examined the decedent. On April 25, he performed a complete surgical excision of the lesion. A laboratory analysis of the excised melanoma revealed a "malignant melanoma, superficial spreading type, Clark's Level III." Later, Bartels referred the decedent to another physician for further review and microsurgery.

In support of their motions for summary judgment, Gorelick and Bartels submitted the declaration of Dr. Jack C. Fisher, M.D., who reviewed all pertinent medical records reflecting the defendants' treatment of the





decedent. He stated that both doctors' approach to the lesion and treatment for it was proper, appropriate and within the applicable standard of care in Monterey in 1986.

In addition, Gorelick submitted a declaration, stating that he advised her that because the lesion was so large, a punch biopsy should be performed to rule out malignant melanoma and that it would not create problems if the lesion was benign.

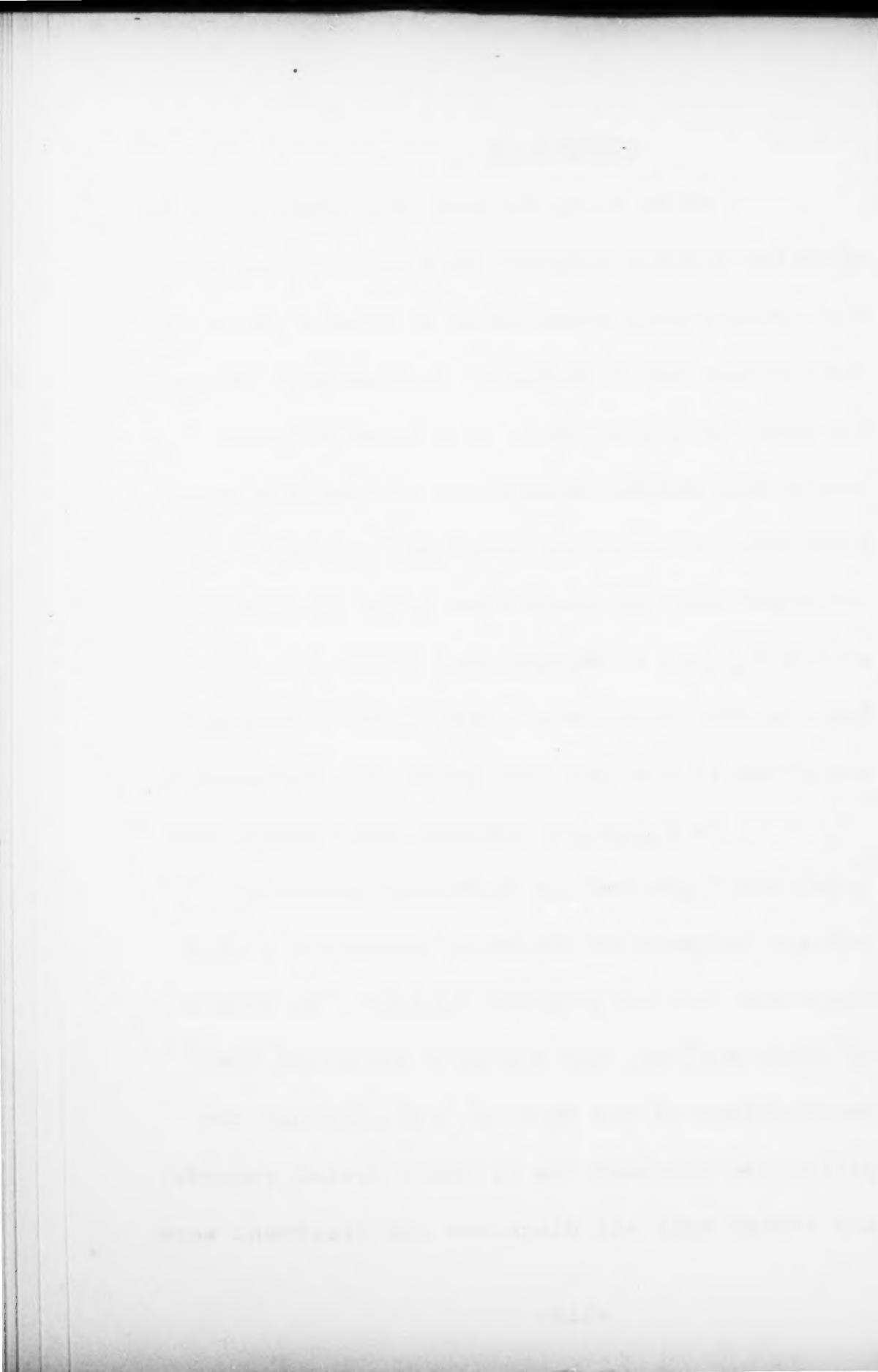
Mount did not submit the declaration of an expert to contradict the opinion of defendants' expert or suggest that leaving the lesion alone was appropriate treatment. Nor did he submit a declaration from anyone who suggested an alternative treatment that was not disclosed. Finally, he submitted no declaration that decedent would have chosen a different or no treatment had the risks of the actual treatment been adequately disclosed.



## DISCUSSION

Mount contends that the trial erred in granting summary judgment because the complaint and declarations established a triable issue of fact concerning defendants' negligence. In particular, he claims there is a triable issue concerning whether defendants advised the decedent about alternative treatment and/or no treatment and the respective risks involved. Citing Willard v. Hagemeister (1981) 121 Cal. App. 3d 406, defendants claim summary judgment was properly granted. We agree with defendants.

In Willard v. Hagemeister, supra, the trial court granted the defendant dentists summary judgment on claims of negligent performance and lack of informed consent. In support of their motions, the dentists submitted the declarations of two experts, who examined the plaintiff, reviewed the relevant dental records, and stated that all diagnoses and treatment were



" 'within the standard of care in the community.'" (Id. at p. 413.) The plaintiff submitted only her personal declaration that the defendant dentists acted negligently. (Ibid.)

On appeal, the court affirmed. It explained that "preemptive weight" is given to expert testimony concerning the "prevailing standard of skill and learning in the locality and of the propriety of particular conduct by the practitioner in particular instances." (Id. at p. 412.) The plainfiff's failure to submit the declaration of an expert in opposition to summary judgment was fatal to her cause because her own declaration did not raise a triable issue concerning the applicable standard of care and the propriety of the defendants' conduct. (Ibid.)

As to claims based on alleged lack of informed consent, the court explained the crucial question is whether the dentists gave the

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plaintiff sufficient information about the nature of their proposed treatment so that she could intelligently decided whether to undergo the dental procedure. (Id. at p. 418.) " 'The scope of the physician's communications to the patient, then, must be measured by the patient's need, and that need is whatever information is material to the decision.'" (Ibid., quoting Cobbs v. Grant (1972) 8 Cal. 3d 229, 245.) As to this claim, "the testimony of the patient-plaintiff may establish the causal relationship between the physician's failure to inform and the plaintiff's injury." (Ibid.)

Under the circumstances in Willard, summary judgment was not proper on the lack of informed consent claim because (1) expert testimony was not needed to prove such a claim and (2) the plaintiff submitted a declaration stating that if the inherent risks of the dentists' proposed treatment had been revealed, she would not have given her consent. (Ibid.)





Here, as in Willard, an expert concluded that the diagnoses and treatment were proper and appropriate. Plaintiff, however, did not present any evidence of an alternative treatment that could have been disclosed but was not. He presented no evidence that the decedent was not fully advised concerning the proposed treatment. And he offered as evidence that the decedent would have not consented to the proposed treatment had she been fully advised of its inherent risks as opposed to the inherent risk of no treatment.

Under these circumstances, we agree with the trial court that in response to defendants summary judgment motion, which established a prima facie grounds to grant the motion, plaintiff failed via counter-declarations to raise a triable issue of fact.

#### DISPOSITION

The judgment is affirmed.



COURT OF APPEAL OF THE STATE OF CALIFORNIA

in and for the

SIXTH APPELLATE DISTRICT

Filed Oct 11 1989  
Court of Appeal  
Sixth App. Dist.  
Michael J. Yerly  
Clerk.

<u>ESTHER MOUNT, et al.,</u>	)	
Plaintiffs and Appellants,	)	No. <u>H004604</u>
	)	
vs.	)	SUPERIOR COURT
	)	No. <u>M18548</u>
<u>MELVIN F. GORELICK, et al.,</u>	)	
Defendants and Respondents)	)	

BY THE COURT

The petition  
for rehearing  
is denied.

Dated OCT 11, 1989

PREMO. ACTING P.J.



ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

Sixth Appellate District No. H004604  
S012544

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

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ESTHER MOUNT Et Al., Appellants

v.

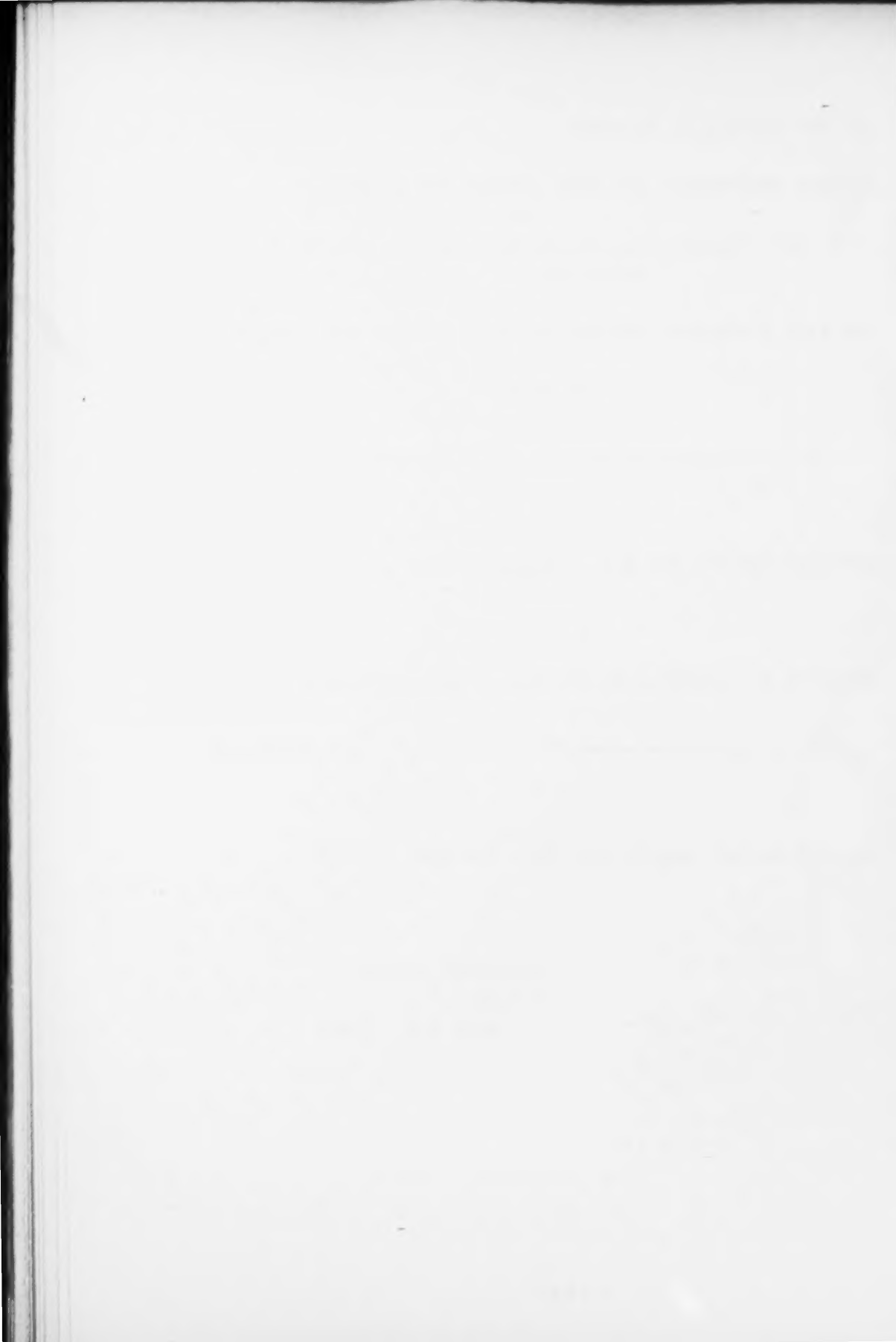
MELVIN F. GORELICK Et Al., Respondents

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Appellants' petition for review DENIED.

SUPREME COURT  
FILED

NOV 29, 1989



PROOF OF SERVICE BY MAIL  
(1013A) (2015.5 C.C.P.)

STATE OF CALIFORNIA)  
 )  
COUNTY OF MONTEREY )

I am now and at all times herein mentioned have been a citizen of the United State, over the age of eighteen years, a resident of Monterey County, California, and not a party to the within action or cause; that my residence address is 13209 Cielo Azul, Castroville, California 95012; that I served a copy of the:

MOUNTS' PETITION FOR A WRIT OF CERTIORARI TO  
THE STATE OF CALIFORNIA SUPREME COURT

by placing said copy in an envelope with first class postage prepaid to be mailed to:

Barry C. Marsh, Esq. (MAILED THREE COPIES)  
152 North Third St. Ste.300d  
San Jose, Ca. 95115-0030

Gerald V. Barron, Esq. (MAILED THREE COPIES)  
Hoge, Fenton, Jones & Appel  
P.O. Box 791  
2801 Monterey-Salinas Highway  
Monterey, Ca. 93940

The Clerk (MAILED FORTY COPIES)  
United States Supreme Court  
U.S. Supreme Court Bldg.  
Washington, D.C. 20543

which envelope was then sealed and, with postage fully prepaid thereon, was on May 30, 1990 deposited in the United States mail at Monterey,

THE UNIVERSITY OF CHICAGO  
LIBRARY  
540 EAST 57TH STREET  
CHICAGO, ILL. 60637  
TEL. 733-4331  
1991



California; that there is delivery service by United States mail at the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 30, 1990 at Monterey, California.

Dorothy Yates  
DOROTHY YATES

Subscribed and sworn to before me, at Monterey, California, this 30th day of May, 1990

June E. Fordham  
JUNE E. FORDHAM

